(2)

No. 05-1507

FILED
JUL 31 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SHERRY OVERHOLT, *et vir.*,

Petitioners,

v.

MONTVILLE TOWNSHIP, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR MEDINA COUNTY RESPONDENTS

JOHN T. MCLANDRICH
Counsel of Record
FRANK H. SCIALDONE
MAZANEC, RASKIN
& RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906

Attorneys for Medina County Respondents

202538

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Petitioners Sherry and Mark Overholt assert a variety of claims related to the execution of a search warrant at their residence and adjoining business property in the early morning of July 25, 2002. But, Medina County and Medina County Sheriff Neil Hassinger (Medina County Respondents) had only limited involvement in the events about which the Overholts complain.

Sheriff Hassinger's involvement was simply that he approved the use of the SWAT Team to secure the premises, and he went to the Overholts' door to seek the cooperation of Mr. Overholt, whose conduct in discharging a firearm at or near persons had led to the issuance of the search warrant. The Sheriff's purpose in going to the door, although doing so exposed him to danger, was to try to prevent any exchange of gunfire and to avoid serious injury for all concerned, both the Overholts and the law enforcement officers. Medina County had no direct involvement; it had been sued based upon the alleged conduct of Sheriff Hassinger and the SWAT Team members.[1] Notably, despite Mr. Overholt's unwillingness to cooperate and his conduct that posed a serious threat to all who were present, Sheriff Hassinger's purpose to avoid serious injury to the officers and the Overholts was achieved.

---

1. The Overholts never filed an amended complaint or any other papers with the district court to name John Doe SWAT Team members. Accordingly, the district court dismissed those defendants. (Pet. at 6a n.1.) No argument has been made that the ruling was erroneous.

The District Court of the Northern District of Ohio granted summary judgment in favor of the Medina County Respondents and the Township Co-Respondents. Upon Petitioners' appeal, the United States Court of Appeals for the Sixth Circuit in an unpublished decision unanimously concluded that, "the issuance of a detailed opinion . . . would be duplicative and would serve no useful purpose." The sixth circuit affirmed the district court's decision "upon the reasoning set out by that court." (*See* Pet. at 4a.)

This Petition raises the following question:

1. Did the Sixth Circuit commit reversible error when it affirmed summary judgment in favor of the Medina County Respondents as to Petitioners' claim of excessive force, when the undisputed evidence established that Sheriff Hassinger did not physically touch either of the Overholts and the Overholts failed – by their own admission – to demonstrate that Respondent Medina County had an unconstitutional policy of any kind?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents iii

Table of Cited Authorities v

Statement of the Facts 1

Clarification of the Record 4

Reasons for Denying this Petition 5

1. The Overholts have not articulated a "compelling" reason for this Court's discretionary review as to Respondent Medina County. 5

2. The Overholts have not articulated a "compelling" reason for this Court's discretionary review as to Sheriff Hassinger. 6

   a. No important federal question is implicated. 6

   b. No conflict exists. 8

   c. The Sheriff's lack of physical contact is one of several reasons the courts below granted summary judgment. 9

Contents

Page

3. The lower courts did not err in granting summary judgment to the Medina County Respondents 10

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Burnette v. Gee, 137 Fed. Appx. 806 (6th Cir. 2005) .. 8

Graham v. Connor, 490 U.S. 386 (1989) 6, 7, 10

Holland v. Harrington, 268 F.3d 1179 (10th Cir. 2001) 13

Maciariello v. Sumner, 973 F.2d 295 (4th Cir. 1992) 12

Malley v. Briggs, 475 U.S. 335 (1986) 12

Martin v. Board of County Comm. of County Pueblo, 909 F.2d 402 (10th Cir. 1990) 8

Monell v. Department of Social Servs., 436 U.S. 658 (1978) 6

Smith v. Freland, 954 F.2d 343 (6th Cir. 1992) 11

Tennessee v. Garner, 471 U.S.1 (1985) 7

Statutes:

42 U.S.C. § 1983 6

Rules:

Sup. Ct. R. 10 5

STATEMENT OF THE FACTS

The Court of Appeals for the Sixth Circuit and the U.S. District Court for the Northern District of Ohio accurately stated the pertinent, undisputed facts relevant to the Overholt's claims. (Pet. at Apx. "A" 1a-4a and Apx. "B" 5a-28a.) For this Court's convenience, the Medina County Respondents provide the following.

On July 24, 2002, at approximately 11:20 p.m., Sgt. Stephen Herte of the Medina County Sheriff's Office ("the Sheriff's Office"), the team leader of the SWAT Team, was contacted by telephone by Officer Ryba of the Montville Township Police Department. Officer Ryba requested the SWAT Team to assist his department with executing a search warrant at the residential and business properties of the Overholts ("the Overholt Premises"). Officer Ryba advised that Mr. Overholt had discharged a handgun at/near people earlier in the day, which led to a search warrant being obtained. Sgt. Herte instructed the Sheriff's Office Dispatch to contact Sheriff Hassinger with this request, and the Sheriff approved the available SWAT Team members to assemble.

Sheriff Hassinger approved the use of the SWAT Team at the Overholt Premises on July 25, 2002, after he reviewed the warrant for a nighttime search that had been obtained by the Montville Township Police, signed by Medina County Common Pleas Court Judge Collier ("the Search Warrant"),[2] and after he was briefed on the nature of the incident that led to the issuance of the Search Warrant, which involved allegations that Mr. Overholt had discharged a firearm

2. The search warrant was facially valid, which had been admitted by the Overholt's below.

multiple times and in the direction of individuals on the Overholt Premises earlier that night (on July 24, 2002). Reasons for requesting the assistance of the SWAT Team included, but were not limited to, the presence of weapons, the presence of uninvolved people, the behavior of an involved person, the criminal record of an involved person, and the speed at which a location needed to be secured.

However, Sheriff Hassinger ordered a variance from standard SWAT Team procedure, because he sincerely believed – and still does sincerely believe – that following the standard procedure was likely to result in injury, or even death, of one or more of the Overholts and/or law enforcement officers. Specifically, he believed that, if the SWAT Team made a sudden entry into the Overholt Premises, Mr. Overholt would initiate gunfire against the entering officers, which would have resulted in a return of gunfire in the direction of Mr. Overholt and possibly Mrs. Overholt. The Sheriff also believed that if he were able to talk with Mr. Overholt, who knows him and knew him then, he could persuade Mr. Overholt to cooperate regarding the execution of the Search Warrant. Therefore, Sheriff Hassinger decided to go to the door for the purpose of making contact with Mr. Overholt. The leader of the SWAT Team opposed this plan, but only because of the danger it posed to Sheriff Hassinger.

At approximately 1:20 a.m. on July 25, 2002, the SWAT Team departed from the Sheriff's Office for the Overholt Premises. After the SWAT Team members took their positions, Sheriff Hassinger and Sgt. Bauman of the Montville Township Police Department went to the front door of the residence at approximately 2:05 a.m. Mrs. Overholt came to the door, and Sheriff Hassinger informed her that he needed to speak with Mr. Overholt. Mrs. Overholt told Sheriff

Hassinger and Sgt. Bauman to "come in." A short while later, Mr. Overholt entered the front hallway, coming from a back room. Mr. Overholt took several steps down the hallway, turned around, stated "this can wait till the morning," and started back towards the back room.

Despite Sheriff Hassinger's hope to avoid a sudden entry by the SWAT Team, when Mr. Overholt failed to comply with Sheriff Hassinger's verbal orders to talk with him in the front hall of the Overholt residence and instead moved back toward the Overholt's bedroom, where it was believed that firearms were located, Mr. Overholt's actions posed a threat to the persons present. At that point, therefore, Sgt. Herte gave the order to make entry. Sgt. Herte gave the order for the SWAT Team to make entry because of weapons being involved in the Search Warrant, the conduct of Mr. Overholt that led to the issuance of the warrant, and concerns that there were weapons in the bedroom.

SWAT Team members assisted only in securing the Overholt Premises and the persons on the premises. Specifically, "Alpha" members of the SWAT Team entered through the front door, through the hallway, and into the back room, which was the master bedroom, where they secured Mr. Overholt after a short physical altercation. Sheriff Hassinger was present during, but not physically involved in, the taking into custody and handcuffing of Mr. Overholt by Sgt. Bauman and one of the SWAT Team members. During that process, Mr. Overholt was struggling with the two officers against being handcuffed, and Sheriff Hassinger encouraged him to stop resisting and instead to cooperate. Only the minimum amount of force necessary to take Mr. Overholt into custody was used. "Bravo" members of the SWAT Team breached the rear door. The rest of the residence

then was checked for any persons other than Mr. and Mrs. Overholt, but none was found. Mr. Overholt was escorted to a small bench in the hallway and released to Sgt. Bauman. The remaining buildings on the Overholt Premises were also checked for any persons and secured; no other persons were found. The premises were then turned over to members of the Montville Township Police Department for execution of the Search Warrant. The SWAT Team departed at approximately 2:30 a.m.

No SWAT Team member participated in the execution of the Search Warrant. When the Search Warrant was executed, at least one firearm was located in the Overholts' bedroom. Indeed, the firearm that Mr. Overholt shot on July 24, 2003, was located in the bedroom.

At no time did either Sheriff Hassinger or Sgt. Herte observe any injury to Mr. or Mrs. Overholt, nor did they hear either of them complain of any injury or observe any other conduct by either of them that would indicate an injury had occurred.

CLARIFICATION OF THE RECORD

Pursuant to Sup. Ct. R. 15.2, Respondents object to the Overholt's representations that the parties in this case involve "numerous county . . . officers, as well as the county's SWAT Team members." (Pet. at 6; *see also* Pet. at ii.) The only Medina County Respondents are Sheriff Hassinger and Medina County itself. The Overholts claim that SWAT team members were wearing masks, and "Petitioners were unable to identify which officers caused their injuries. This was, ostensibly, the reason the district court failed to address the SWAT Team member's liability." (Pet. at 20 n.7.) The district

court, in fact, did address the unnamed SWAT Team member's liability. The individual SWAT Team members were never properly named in the suit, despite their identities being known through written discovery. (Pet. at 6a n.1.) As the district court held, "In Plaintiffs' Amended Complaint, they name 'SWAT Team Member John Doe' and 'SWAT Team Member Janet Doe' as Defendants. However, Plaintiffs never filed a Second Amended Complaint or any other papers with the court to name these Defendants. Accordingly, [those Defendants] are dismissed from this suit." (Pet. at 6a n.1.) The Overholts do not argue that the unnamed SWAT Team members were erroneously dismissed.[3]

These Respondents object to the suggestion that the Sheriff apologized to Mr. Overholt as tantamount to some acknowledgment of wrongdoing on his part. The Sheriff's comments to Mr. Overholt were simply that the situation was unfortunate – nothing more.

REASONS FOR DENYING THIS PETITION

1. The Overholts have not articulated a "compelling" reason for this Court's discretionary review as to Respondent Medina County.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. This case poses no "compelling reason" for review.

The Overholt's first question deals exclusively with Montville Township's purported failure to document citizen

---

3. The Petitioners did not take the depositions of the SWAT Team members involved that night, despite the disclosure of their identities through written discovery.

complaints of constitutional violations. (*See* Pet. at 7.) Medina County Respondents are not mentioned. In fact, as to entity liability, the Overholts acknowledged that they had no evidence of the County's liability and do not argue here the County is liable. As the district court properly observed, "even if there were a valid § 1983 claim against the individual Defendants, Plaintiffs have utterly failed to put forward any evidence that would trigger municipal liability." (Pet at 18a.) If the Overholts suggest that Medina County could be held vicariously liable, they are incorrect. The law is established that an entity cannot be held liable simply on a theory of *respondeat superior*. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691-95 (1978).

2. The Overholts have not articulated a "compelling" reason for this Court's discretionary review as to Sheriff Hassinger.

The Overholts argue that this Court should review this case presumably because the lower courts improperly decided an important federal question. Specifically, the Overholts state that this Court has "not previously considered whether personal involvement for Section 1983 liability requires actual physical contact or resulting physical injury." (Pet. at 17.) Not only is this statement untrue, but the statement also indicates a fundamental misunderstanding of the *Graham* test.

a. No important federal question is implicated.

Despite the Overholt's assertion, this Court has considered the issue of "actual physical contact" in the seminal case of *Graham v. Connor*, 490 U.S. 386 (1989). In setting out the controlling analysis for excessive force claims,

this Court indicated that actual physical touching was not necessary to establish the threshold requirement of a seizure of the person. Rather, "[a] 'seizure' . . . occurs only when government actors have, 'by means of physical force **or show of authority**, . . . in some way restrained the liberty of a citizen' " *Id.* at 395 n.10 (emphasis added). Physical contact is similarly not required to demonstrate the unreasonableness of the force used to effect a particular seizure. "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* at 395.

"The test of reasonableness [of force] under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396, *citing Tennessee v. Garner*, 471 U.S. 1 at 8-9 (1985). The question is whether the **totality of the circumstances** justifies a particular sort of seizure. (*Id.*) The analysis of excessive force claims under Section 1983 is well established and should not be revisited here.

Physical contact is a component – very typically an essential component – of the excessive force inquiry under *Graham*. The lower court's treatment of the issue of physical contact is merely one aspect of the totality of the circumstances inquiry. But, "the ultimate question is 'whether the totality of the circumstances justifies a particular sort of seizure." *Graham*, 490 U.S. at 396. In this case, the Sheriff's lack of personal involvement was undoubtedly a central factor. Despite the Overholt's representations, nothing indicates that the lower courts misapplied the proper law under *Graham*.

b. No conflict exists.

The Overholts also suggest that there is a conflict among the circuits as to whether physical contact is required to establish an excessive force claim. There is no conflict.

The Overholts cite to case law that finds that the absence of physical contact may be a determining factor in analyzing the use of force. (Pet. at 20.) The Overholts also cite to other case law that finds that the lack of physical contact does not constitute a determining factor. (Pet. at 21.) The reason that these cases pose no real conflict should not be surprising: Direct physical contact is merely a **factor** in the totality of circumstances test under *Graham*.

In other words, in some cases the lack of direct physical contact – as is the case here – may be dispositive of the excessive force inquiry. *See, e.g., Burnette v. Gee*, 137 Fed. Appx. 806, 810 (6th Cir. 2005) (sheriff charged at plaintiff does not constitute excessive force as there was no physical contact) [cited in Pet. at 20]. In other cases, that may not be true. For example, in *Martin v. Board of County Comm. of County Pueblo*, 909 F.2d 402, 406 (10th Cir. 1990) the court affirmed the denial of summary judgment on an excessive force claim that involved no direct physical contact. [Cited in Pet. at 21-22.] The defendant officers allegedly knew that a plaintiff could suffer paralysis should she be moved from the hospital without the assistance of a gurney or wheelchair. Nevertheless, the officers forced the plaintiff to walk to a van, climb in, ride to jail, make her way inside and then sit for an hour without medical attention. The officers argued that they could not be held liable because they did not actually strike the plaintiff. The court rejected this argument and determined a claim for excessive force could lie.

The instant dispute is not such a case. The facts are undisputed that Sheriff Hassinger did not touch, did not verbally threaten, and did not physically threaten the Petitioners. The Sheriff merely approved the Township's use of the SWAT team. In fact, the Sheriff did not give the order for the entry of the SWAT team. The Sheriff, at risk to himself, tried to talk with the Overholts to consent to a search before Mr. Overholt rejected his efforts and began to go back to his bedroom where it was believed to be – and, in fact, were – loaded firearms.

c. The Sheriff's lack of physical contact is one of several reasons the courts below granted summary judgment.

The Overholts rely on the district court's reference to Sheriff Hassinger having "no physical contact with either of the Overholts" as dispositive of Petitioners' claim that he should be liable for using excessive force. (Pet. at 17.) While Respondents believe that to be true in this case, the district court and the sixth circuit **also** determined that Sheriff Hassinger could not be held liable for the additional reasons that the force used by the Township Defendants and the SWAT team members was otherwise objectively reasonable and therefore not a violation of the Fourth Amendment. Finally, the lower courts also found that the Sheriff would be immune under the doctrine of qualified immunity. So, even assuming that this Court were to look favorably upon the Overholt's claim of a circuit conflict, qualified immunity would also provide an independent ground for affirming the lower courts' decisions. In that event, this Court would be issuing a purely advisory opinion.

3. The lower courts did not err in granting summary judgment to the Medina County Respondents.

The lower courts properly authorized summary judgment in favor of the Medina County Respondents. Failing to demonstrate a convincing legal reason for this Court to grant certiorari, Petitioners argue that the lower courts simply misapplied the facts to the law. This claim is insufficient to warrant this Court's review. Supreme Court Rule 10 ("a petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Moreover, four judges unanimously agreed (district court judge and three-judge appellate panel) that the law was accurately applied to the facts of this case.

Sheriff Hassinger acted in a constitutionally reasonable manner and did not violate clearly established law. An excessive force claim is analyzed under Fourth Amendment "reasonableness" standards. *Graham v. Connor* (1989), 490 U.S. 386, 394-97. A plaintiff must prove that the conduct at issue was objectively "unreasonable." *Id.* The Supreme Court has made clear that the reasonableness test under the Fourth Amendment "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. Courts must bear in mind that "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" violates the Fourth Amendment, and "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

As courts have consistently observed:

> [U]nder *Graham [v. Connor, supra]*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

E.g., *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (brackets added).

There is no dispute that the Medina County Respondents were executing a facially valid search warrant.[4] There also is no dispute that Mr. Overholt was accused of firing a gun at people on his property and that officers on the scene believed that he had – and actually did – have weapons located on the premises. Mr. Overholt told Sheriff Hassinger that he was not going to speak with the officers and turned around and began walking toward his bedroom. The officers had a very real concern that Mr. Overholt may access weapons that were believed to be in – and actually were in – his bedroom. In a footnote, Petitioners state that "there was no reason for defendants to be concerned about Petitioners' or

4. Petitioners argue that Township Officer Respondent Grice purportedly "lied to the county judge in getting the night search warrant issued, and . . . an arrest warrant was attested to and issued by the clerk of court prior to 2:10 a.m." While there is no evidence of that being the case, the Overholts have not argued that the Medina County Respondent knew of this purported "lie."

other's safety and defendants admit that Petitioners had no history of violence." (Pet. at 23 n.8.) Viewed without the benefit of 20/20 hindsight and in light of the allegations that Mr. Overholt had fired his weapon at other persons the day before, the Overholts cannot demonstrate – and could not demonstrate to the lower courts – that the officer's conduct was "objectively unreasonable."

Further, there is also no dispute that Mr. Overholt admitted to putting up "resistance" and "struggling with the officers." Mrs. Overholt also disobeyed the officers when told to get down on the floor, she instead sat in a chair. In light of the defiant actions of the Overholts combined with the dangers previously stated, the officers on the scene cannot be said to have acted objectively unreasonably.

The doctrine of qualified immunity holds that an individual officer cannot be held liable for bad guesses in the gray areas; they are liable for transgressing bright lines." This Court has construed qualified immunity protection to shield "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines. *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). In this case, even with the benefit of hindsight, it cannot be reasonably said that the officers even made a "bad guess." Rather, the officers – specifically Sheriff Hassinger – acted prudently for the safety of all involved. In fact, Sheriff Hassinger tried to avoid the use of a sudden entry all together by using his personal relationship with the Overholts to convince them to comply with the search.

The Overholts claim that, "it cannot be argued that any officer in charge would not anticipate that the SWAT Team would utilize excessive force if activated." (Pet. at 24.) To suggest that simply authorizing the use of a SWAT team automatically means "excessive" force would be used is simply wrong. The Overholts fail to cite to any case in support of that overly broad claim. The Overholts do rely on the Tenth Circuit case of *Holland v. Harrington*, 268 F.3d 1179 to support the contention that the mere authorization of a SWAT team is tantamount to excessive force. (Pet. at 23-26.) But, the *Holland* case holds that the decision to deploy a SWAT team did not violate a constitutional right. In fact, the *Holland* court reversed the district court's denial of summary judgment on that very claim. The Overholt's citation to that case not only fails to support their claim, but demonstrates the propriety of the lower courts' holdings in this case. The Overholts fail to establish any reason – let alone a compelling reason – to review this case.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

JOHN T. MCLANDRICH
Counsel of Record
FRANK H. SCIALDONE
MAZANEC, RASKIN
& RYDER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906

Attorneys for Medina County Respondents